CLERK'S COPY. 14461

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 113.

THE SAN JOSE LAND AND WATER COMPANY, PLAINTIFF IN ERROR,

vs.

THE SAN JOSE RANCH COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED [illegible]

(14,461)

(18,195.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1901.

No. 342.

THE SAN JOSE LAND AND WATER COMPANY,
PLAINTIFF IN ERROR,

vs.

THE SAN JOSE RANCH COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from superior court of the county of Los Angeles	2	1
Complaint	2	1
Amended answer	4	2
Findings of fact	8	4
Conclusion of law	19	10
Stipulation as to findings, &c	19	10
Order as to findings, &c	19	10
Decree	20	10
Plaintiff's engrossed statement on motion for a new trial	20	11
Deed, Jacob Heckenlively to S. P. Cushman, Dec. 14, 1887	22	11
Exhibit "A"—Agreement of December 6, 1887	23	12
Deed, S. P. Cushman to San Jose Land and Water Co., August 29, 1888	25	13
Notice from plaintiff to defendant	26	14
Testimony of J. Heckenlively	27	15
T. W. Brooks	28	15
Affidavit of Jacob Heckenlively	29	16
Testimony of N. W. Stowell	31	17

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 27, 1902.

	Original.	Print
Deposition of David O'Donnel	35	19
Deposition of J. W. Haynes	35	19
Assignment of errors	37	19
Stipulation of facts	38	20
Amended articles of association, Southern Pacific Railroad Company	40	21
Agreement, Southern Pacific Railroad Company and Nolan *et al.*, February 28, 1887	42	23
Judge's certificate to statement	49	26
Order denying motion for new trial	49	26
Notice of appeal	49	26
Notice of appeal	50	27
Stipulation as to record, &c.	51	27
Acceptance of service of copy of record	52	27
Clerk's certificate as to record	52	28
Appellant's opening brief (omitted in printing)	53	—
Brief on behalf of respondent (" ")	66	—
Appellant's reply brief (" ")	95	—
Closing brief for respondent (" ")	113	—
Petition for rehearing (" ")	132	—
Opinion	154	28
Docket entries	165	33
Petition for writ of error	166	34
Order granting writ of error	169	35
Citation (copy)	170	35
Clerk's certificate	171	36
Writ of error	172	37
Stipulation to add judgment to record	174	38
Judgment	175	38
Stipulation as to assignment of errors	179	39
Assignment of errors	180	39
Stipulation as to printing record	185	41

1 In the Supreme Court of the State of California.

SAN JOSE LAND AND WATER COMPANY, Plaintiff and Appellant,
vs.
SAN JOSE RANCH COMPANY, Defendant and Respondent.
} L. A., No. 858.

Appeal from superior court of the county of Los Angeles—W. H Clark, judge.

Transcript on Appeal.

Anderson & Anderson and R. Dunnigan, attorneys for plaintiffs and appellants.

John S. Chapman, attorney for defendants and respondents.

Filed December 2nd, 1899.

GEO. W. ROOT, *Clerk*,
By H. G. SIMPSON,
Deputy Clerk.

2 In the Superior Court in and for Los Angeles County, State of California.

SAN JOSE LAND AND WATER COMPANY, Plaintiff,
vs.
SAN JOSE RANCH COMPANY, Defendant.

Complaint.

Plaintiff complains of defendant and alleges:

I.

That the plaintiff is, and — all the times hereinafter mentioned, was a corporation organized and existing under and by virtue of the laws of the State of California.

II.

That the defendant is, and — all times hereinafter mentioned was, a corporation organized and existing under and by virtue of the laws of the State of California.

III.

3 That the plaintiff is now and for a long time hitherto has been, the owner of that certain lot piece or parcel of land, situate, lying and being in the county of Los Angeles, State of California, and bounded and described as follows, to wit:

Being the east half of the northwest quarter of section twenty-five, township 1, N. R. 9, W., S. B. M.

IV.

That the defendant claims an estate or interest in said land adverse to the said plaintiff.

V.

That the claims of said defendant *is* without any right whatever, and that said defendant has not any estate or title or interest in said estate or any part thereof.

Wherefore plaintiff prays:

1. That the defendant may be required to set forth the nature of its claims, and that all adverse claims of the defendant may be determined by a decree of this court.

2. That by said decree it be declared and adjudged that defendant has no estate or interest whatever in or to said land or premises, or any part thereof, and that the title of plainiiff thereto is good and valid.

3. That the defendant be forever enjoined and debarred from asserting any claim whatever in or to said land and premises adverse to said plaintiff, and that plaintiff recover possession of said land from the defendant, and for such other and further
4 relief as to this honorable court may seem meet and agreeable to equity and for costs of suit.

R. DUNNIGAN &
ANDERSON, FITZGERALD & ANDERSON,
Attorneys for Plaintiff.

Endorsed: Filed Apr. 3, 1889, Chas. H. Dunsmor, clerk, by F. B. Fanning, deputy.

(Title of Court and Cause.)

Amended Answer.

Now comes the defendant and by leave of the court first obtained, files this its amended answer to the complaint herein, and for a first defense.

I.

1. Denies that the plaintiff is now, or ever was the owner of the land described in the complaint, and being the east half of the northwest quarter of section 25, township 1 north, range 9 west, S. B. M., or any part thereof.

2. The defendant denies that it claims any interest in the said property described in the complaint, excepting the right to maintain a dam in the San Dimas creek at a point about one hundred yards northerly from the center of said section 25, and to maintain pipes connecting with the said creek at the said dam for the purposes of conducting the waters of the said creek to lands below the said section 25, for the purposes of irrigation and for domestic use; and that, as to the said claim of the defendant, the defendant denies

that said claim is without right, but, on the contrary avers
5 that its said claim of right to maintain the said dam and the said pipes, and to conduct the water therethrough, is valid.

II.

For a further and second defense, the defendant avers that the plaintiff's cause of action is barred by the provisions of section 318 of the code of civil procedure of the State of California.

III.

For a further and third defense, the defendant avers:

1. That, some time in the year 1868, one J. W. Hanes settled upon a certain tract of land in the mouth of the San Dimas canyon, in the county of Los Angeles, and near the center of said section 25, township 1 north, range 9 west, claiming the same for the purposes of cultivation and grazing; and on the 23rd day of September, 1870, caused to be recorded in the office of the county recorder of Los Angeles county a pos-es-ory claim under an act of the legislature of the State of California entitled, "An act prescribing the mode of maintaining and defending pos-essory actions on the public lands in the State of California," approved April 20th, 1852, and the acts supplemental thereto and amendatory thereof, setting forth, in his affidavit claiming the same, that the lines of the tract so claimed, did not embrace more than one hundred and sixty acres of land, and that he held no other claim under the said act, and to the best of his knowledge and belief, that the said lands were not
6 claimed under any existing title, and giving in the said statement and claim a description of the said tract so claimed by him, and which said claim was duly verified before J. W. Gillette, a deputy county clerk of the county of Los Angeles.

2. That the said J. W. Hanes was, at the time of filing of his said pos-essory claim, a citizen of the United States, and at the time of locating the said claim and filing the said statement and affidavit, the said claimant had marked by metes and bounds the said tract of land, so that the bound-ries might be readily traced, and had entered into the occupation of said claim, and was at the date of the occupation of said claim in the actual occupancy of said tract of land.

3. That the said J. W. Hanes, at the same time, claimed the waters of the San Dimas creek for the purpose of irrigation and domestic uses, and had prior to that time entered upon the said creek about one hundred yards north of the north bound-ry of his said claim, and about one hundred yards north of the north bound-ry of the southeast quarter — said section 25, and about twenty feet west of the north and south line through the center of said section, and constructed in said creek a dam, and constructed a ditch connected with the said creek at a point immediately above the said dam, and extending down to and upon the said tract of land so claimed by him, for the purpose of diverting the waters of said stream, and by means

of said dam and ditch did divert the waters of said stream to
7 and upon the land so occupied by him, and used the same for the purposes of irrigation and domestic uses.

4. That the said ditch and the pipes subsequently laid along the course thereof have been continuously used by the defendants and its grantors and predecessors from the said time in 1870 down to the commencement of this action, for the purpose of diverting the said waters of said stream for use as aforesoid, upon the said lands and other lands in the vicinity of the said southeast quarter of section 25 aforesaid.

5. Defendant further avers that at the time of the location of the said lands by the said Hanes, and the appropriation of the said waters, the said section 25 was unsurveyed public lands of the United States; and defendant further avers that it has succeeded, by mesne conveyance, to all the right, title and interest of said J. W. Hanes in and to the said dam, ditches, pipes, rights of way and easements upon said section 25, and it and its grantors and predecessors have, ever since the year 1870, been in the open, notorious, exclusive, uninterrupted and adverse use of the said dam, ditches and pipes, using the same for diverting the waters of the said creek for the purposes aforesaid, under a claim of right, and adversely to the plaintiff and to the whole world. And defendant further avers that the right to maintain the said dam and the said pipe and ditches and the right to conduct the water from the said stream at the point where the said dam is constructed to the said southeast quarter of section
25 aforesaid, and the lands in the vicinity thereof, is the only
8 right claimed by the defendants in the said east half of the northwest quarter of said section 25.

Wherefore, defendant prays that it be adjudged that plaintiff take nothing by its suit, and that the defendant has the right to maintain the said dam and the said pipe and ditches, and to conduct the waters of the said San Dimas creek as aforesaid, and that it recover its costs and such other and further relief as may be just.

A. W. CHAPMAN & HENDRICK,
Att'ys for Def'd't.

Endorsed: Received copy of the within this 21 day of May, 1890, and consent that it may be filed. Anderson, Fitzgerald & Anderson, R. Dunnigan, attorneys for pl'ffs. Filed May 21, 1890. Chas. H. Dunsmoor, clerk; by D. E. Adams, deputy.

(Title of Court and Cause.)

Findings of Fact.

Upon the evidence, oral and documentary, introduced by plaintiff and defendant at the trial of the above-entitled action, and upon the several stipulations signed by plaintiff and defendant and filed herein, the court now makes the following findings of fact, to wit:

I.

The plaintiff, The San Jose Land & Water Company, is a corporation duly incorporated and organized under the laws of
9 the State of California.

II.

The San Jose Ranch Company is a corporation duly incorporated and organized under the laws of the State of California.

III.

That a corporation entitled "Southern Pacific Railroad Company" was organized under the laws of the State of California by articles of incorporation dated December 9th, 1865, for the purpose of constructing and operating a railroad from a point on the bay of San Francisco in said State, and to pass through the counties of Santa Clara, Monterey, San Luis Obispo, Los Angeles, and San Diego, to the eastern line of said State of California. Said company was not authorized by its articles of incorporation, nor by the laws of the State of California to construct a railroad from Tehachapi by way of Los Angeles to the Colorado river.

IV.

Said company did accept the grants, rights, and franchises granted by the act of Congress of March 3rd, 1871, and entitled "An act to incorporate the Texas & Pacific Railroad Company, and to aid in the construction of its road and for other purposes," and did, on April 3rd, 1871, pursuant to said act, file in the office of the Commissioner of the General Land Office its map of location.

V.

On the 12th day of August, 1873, a corporation was organized under the laws of the State of California by the consolida-
10 tion of the Southern Pacific Railroad Company and the Southern Pacific Branch Railroad Company, by articles of incorporation dated the said 12th day of August, 1873. Said articles did provide for the formation of a new corporation to be known as the Southern Pacific Railroad Company, with a capital stock of ninety millions of dollars in lieu and stead of a capital stock of seventy millions of dollars as provided for in the articles of December 9th, 1865, and mentioned in paragraph numbered III of these findings, and did provide for the issue of new stock and the surrender of the stock held in the old and contracting companies, and for the transfer to the said newly incorporated company of all the rights, franchises and property of said companies.

VI.

Said consolidation and transfer was actually made and said newly organized corporation did between years 1874 and 1879, build and construct a railroad from Tehachapi pass by way of Los Angeles to Yuma, and said construction thereof has been accepted by the

President of the United States as having been done and made under and pursuant to said act of Congress of March 3rd, 1871.

VII.

Said company did select the east one-half of the northwest one-quarter of section twenty-five (25), township one (1) north, range nine (9) west, San Bernardino meridian, claiming that the same belonged to it under said act of Congress of March 3rd, 1871.

11

VIII.

Said described tract of land is within ten miles of the Southern Pacific railroad as shown by its location map filed pursuant to said act of Congress and is non-mineral land and is unpatented.

IX.

Said described tract of land is within the indemnity limits of the land grant to the Atlantic and Pacific Railroad Company by act of Congress of July 27th, 1866, as shown by its designated route of road-bed, filed in the office of the Commissioner of the General Land Office. Said Atlantic & Pacific Railroad Company never complied with the terms of said land grant and never built its said road.

X.

That on the 28th day of Febuary, 1887, the Southern Pacific Railroad Company and one W. D. Noland and one Jacob Heckenlively did enter into a contract, the terms and conditions of which are as follows, to wit:

"This agreement made at San Francisco, California, this 28th day of February, A. D. 1887, between the Southern Pacific Railroad Company, party of the first part, and W. D. Noland and J. Heckenlively of the county of Los Angeles, State of California, parties of the second part, witnesseth: That the party of the first part, in consideration of the covenants and agreements of the parties of the second part hereinafter contained, agrees to sell to the parties of the second part the following tract of

12 land situated in the county of Los Angeles, State of California, and known and designated on the public surveys of the United States as the northwest quarter of section 25 township one north, range 9 west, San Bernardino base and meridian, containing 160 acres of land, for the sum of $160 *dollars* gold coin of the United States. And the parties of the second part, in consideration of the premises agree to buy the land hereinbefore described and to pay to the party of the first part the said sum of $160 as follows, to wit: $32, and also $8.96 one year's interest in advance on the remainder, in United States gold coin of the present standard of value, on the execution of this contract (which two last-mentioned sums have this day been fully paid), and the remainder, to wit, the sum of $128, with interest thereon annually in advance at the rate of seven per cent. per annum both in the United States gold coin of the present standard of value, at its office in the city and county of

San Francisco, on or before the 28th of February, 1892; and also to pay all taxes and assessments that may at any time be levied or imposed upon said premises, or any part thereof, and if the parties of the second part shall fail to pay such taxes or assessments, or any part thereof, at any time when the same shall become due, then the said party of the first part may pay the same and all sums so paid by the party of the first part shall be added to and become a part of the unpaid remainder and shall bear interest at the same rate and
be paid in the same manner and at the same time and place
13 hereinbefore provided for the payment of said remainder and
the interest thereof. It is further agreed that upon the punctual payment of said purchase-money, interest, taxes and assessments, and the strict and faithful performance by the parties of the second part, their legal representatives or assigns, of all the agreements herein contained, the party of the first part will, after the receipt of a patent therefor, from the United States, upon demand and the surrender of this instrument, execute and deliver to the parties of the second part, their heirs and assigns, a grant, bargain and sale deed of said premises, reserving all claim of the United States to the same as mineral land. It is further agreed that until the full payment of said purchase-money, interest, taxes and assessments no strip or waste shall be made on said premises, and that no wood or growing trees shall be cut thereon, except for necessary fuel for the family of the legal occupant under this contract, and for the erection of buildings or fences upon said land, without the previous, written consent of the party of the first part. It is further agreed that the parties of the second part may at once enter upon, take and hold possession of said premises, provided, however, that if the parties of the second part shall fail to make any of said payments of remainder or interest, taxes or assessments as herein provided, or shall fail to comply strictly with any of the stipulations of this contract, then this right shall cease and the
party of the first part, its successors or assigns may, without
14 notice, enter upon, take and hold possession of said premises
with the improvements thereon. It is further agreed between the parties hereto that the party of the first part claims all the tracts hereinbefore described as part of a grant of lands to it by the Congress of the United States; that patent has not yet issued to it for said tracts; that it will use ordinary diligence to procure patents for them; that as in consequence of circumstances beyond its control it sometimes fails to obtain patents for lands that seem to be legally a portion of its said grant, therefore, nothing in this instrument shall be considered a guaranty or assurance that patent or title will be procured; that in case it be finally determined that patent shall not issue to the said party of the first part for all or any of the tracts herein described, it will upon demand repay (without interest) to the parties of the second part all moneys that may have been paid to it by them on account of any such tracts as it shall fail to procure patent for, the amount of repayment to be calculated at the rate and price per acre fixed at this date for such tracts by said party of the first part as per schedule on page three

hereof; that said lands being unpatented the party of the first part does not guarantee possession of them to the parties of the second part and will not be responsible to them for damages or costs in case of their failure to obtain and keep such possession. It is further agreed that if the party of the first part shall obtain patent for a part of the lands herein described and shall fail to obtain
15 patent for the remainder of them, this contract shall in all its provisions be and remain in full force and virtue as to the tracts patented, and shall, except as to repayments herein provided for, be null and void as regards those tracts for which it shall be finally determined that patents cannot be obtained. It is further agreed that the parties of the second part will never deny that the tracts herein described or any part of them, are a part of said grant and will do no act to hinder, delay or impede the obtaining of patent for them by the party of the first part, and that they will not obtain or hold possession of all or any of them adversely to said party of the first part. It is further agreed that this contract shall not be assignable, except by indorsement and with the written consent of the party of the first part and the written promise of the assignee to perform all the undertakings and promises of the parties of the second part as above set forth. It is further agreed that the parties of the second part shall pay three dollars for expenses of acknowledgment to the deed that shall be issued on this contract."

XI.

That both the said Noland and the said Heckenlively are native-born citizens of the United States and did enter into said agreement of purchase in good faith, believing that the Southern Pacific Railroad Company had by virtue of its said grant the right to sell said described tract of land. That said Noland and said Heckenlively made the first payment as called
16 for in said contract and the annual interest on the balance has been paid up to February 28th, 1892, and no other or further payments of interest or principal have been made. That at the time of the execution of said contract said tract of land was not in the *bona fide* occupation of any adverse claimant under the pre-emption or homestead laws of the United States and the same had not been settled upon at the date of said purchase or on the 3rd day of March, 1887, or subsequent to December 1st, 1882, by any person claiming to enter the same under the settlement laws of the United States. That neither the said Noland nor the said Heckenlively nor their assigns ever settled upon said described tract of land or cultivated or fenced the same or any part thereof, but the said Heckenlively did, under said agreement of purchase and shortly after the same was executed, enter upon said land and commence the construction of a ditch and tunnel thereon.

XII.

That thereafter and prior to the 6th day of December, 1887, the said Heckenlively did purchase of said Noland all the interest of the said Noland in and to said land under and by virtue of said

contract as set forth in paragraph X of these findings, and the same was assigned to him, but such assignment was not consented to by the railroad company nor did any of the assignments of said contract or any interest therein receive the consent of the Southern Pacific R. R. Co.

17

XIII.

That thereafter, on December 14th, 1887, the said Heckenlively did by deed in form of grant, bargain and sale and for the expressed consideration of one thousand dollars, sell and convey to one S. P. Cushman a portion of the land described in the contract mentioned in paragraph numbered X of these findings and being the land described in paragraph numbered VII of these findings, to wit, the E. ½ of the N. W. ¼ of sect. 25, tp. 1 N., R. 9 W., S. B. M.

XIV.

Thereafter on August 29th, 1888, the said S. P. Cushman did, by deed of grant, bargain and sale and for the expressed consideration of $550, sell and convey to the plaintiff The San Jose Land & Water Company said last described tract of land, to wit: the E. ½ of the N. W. ¼ of sect. 25, tp. 1 N., R. 9 W., S. B. M.

XV.

Said described tract of land is situate in San Dimas canyon in Los Angeles county, and the waters of San Dimas creek or stream flow upon and through a portion of said land. That in and prior to the months of November and December, 1883, one N. W. Stowell owned, or claimed to own, a certain water right in the waters flowing in said creek or stream, the character and extent of which water right the court does not now find or adjudicate; and in said months of November and December, 1883, the said Stowell did enter upon said land and did lay and construct across a portion of said land a 12-inch-pipe line for the purpose of conducting the water so
18 claimed by him from its point of diversion (which point of diversion was not upon said described land) across said land to the S. E. ¼ of said sect. 25, tp. 1 N., R. 9 W., S. B. M., and to other lands.

XVI.

That prior to the month of July, 1887, the defendant, The San Jose Ranch Company had, by mesne conveyances, succeeded to and and now owns the said water right owned or claimed by the said Stowell and all the right and interest of the said Stowell in and to said 12-inch-pipe line.

XVII.

That in the months of July and August, 1887, the defendant The San Jose Ranch Company, by its agents and servants, did enter upon said described land, to wit, the E. ½ of the N. W. ¼ of sect. 25, tp. 1 N., R. 9 W., S. B. M., and did build and construct thereon at a point where the waters of said San Dimas creek flow thereon a stone, brick

and cement forebay, sand box or dam, and did lay and construct from said forebay or dam across a portion of said land a 14-inch-pipe line.

XVIII.

The defendant The San Jose Ranch Company claims the right to maintain on said land, to wit, upon the E. ½ of the N. W. ¼ of sect. 25, tp. 1 N. R. 9 W., S. B. M., the said forebay or dam and the said 14-inch-pipe line mentioned in paragraph XVII of these findings, and also the 12-inch-pipe line mentioned in paragraphs numbered XV and XVI of these findings, but makes no other claim of
19 right, title or interest in or to said described land or any part thereof.

As conclusions of law from the foregoing facts the court finds that the defendant is entitled to judgment that pl't'ff take nothing by its suit and that defendant recover its costs.

W. H. CLARK, *Judge.*

It is hereby stipulated by and between the parties to the above-entitled action, that the foregoing is a full, true and correct copy of the findings of fact and conclusions of law heretofore filed in the above-entitled cause.

It is further stipulated that the original findings of fact and conclusions of law herein have been lost, and that the foregoing may be substituted as a correct copy thereof in lieu of the original.

Dated June 21, 1899.

ANDERSON & ANDERSON,
DUNNIGAN & DUNNIGAN,
Attorneys for Plaintiff.
J. S. CHAPMAN,
Attorney for Defendant.

It is hereby ordered that the foregoing copy of the findings of fact and conclusions of law be substituted and filed in the above-entitled cause as a correct copy of the original heretofore filed herein, it appearing to the court that the said original findings of fact and conclusions of law have been lost.

Done in open court this 29th day of June, 1899.

JOHN L. CAMPBELL,
Judge of the Superior Court, Presiding.

20 Endorsed: Filed Jun-29, 1899, C. W. Bell, clerk, by J. O. Lowe, deputy.

(Title of Court and Cause.)

Decree.

No. 10166. Dept. 2.

This cause having been submitted to the court upon the pleadngs and evidence in the case and the argument of counsel for the

respective parties and the court having filed findings of fact and conclusions of law and ordered judgment accordingly:

Now, therefore, it is ordered, adjudged and decreed that the said plaintiff is not the owner of said east half of the northwest quarter of section twenty-five, township one north, range nine west, San Bernardino meridian.

And it is further adjudged that the plaintiff take nothing by its suit against the defendant, and that the defendant recover its costs, herein taxed at the sum of $—.

W. H. CLARK, *Judge.*

Endorsed: Filed Mar. 12, 1897. T. E. Newlin, clerk, by C. G. Keyes, deputy. Docketed Mar. 12, 1897. Entered Mar. 12, 1897. Book 67, page 176. By W. H. Whittemore, deputy clerk.

(Title of Court and Cause.)

Plaintiff's Engrossed Statement on Motion for a New Trial.

This cause came on regularly for trial on the first day of
21 September, 1890. The plaintiff appeared by its attorneys Messrs. Anderson & Anderson and R. Dunnigan, Esq., and the defendant appeared by its attorneys Messrs. Chapman & Hendricks and Walter Hughes, Esq., and a trial of said action by a jury was waived and the cause was submitted to the court, who, after hearing the evidence and arguments of counsel, duly considered the cause and on the — day of ——, 1897, did order findings and judgment for defendant. That afterwards, on the — day of April, 1897, and within the time required by law, the plaintiff served its notice of intention to move for a new trial upon the grounds,

First. Of newly discovered evidence;

Second. The insufficiency of evidence to justify the decision of the court; and

Third. That the decision and judgment of the court were contrary to law.

And the plaintiff now here presents its statement of the case pursuant to said notice of intention, containing the evidence offered at the trial of said cause.

2.

Plaintiff offered in evidence in support of the issues in its behalf, an instrument purporting to be a contract between the Southern Pacific Railway Company and Noolan and Heckenlively; also an instrument purporting to be an assignment by Noolan of his interest in the instrument to said Heckenlively; a copy of which instrument and assignment *are* hereunto annexed, marked Exhibit "A" and
made a part hereof; also an assignment and deed from
22 Heckenlively to Cushman, of which said deed the following is a copy:

This indenture, made the 14th day of December in the year of our Lord one thousand eight hundred and eighty-seven, between

Jacob Heckenlively of Los Angeles county, State of California, the party of the first part & S. P. Cushman of said county and State party of second part, witnesseth: that the said party of the first part for and in consideration of the sum of one thousand dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do- by these presents grant, bargain, sell, convey and confirm unto the said party of the second part and to heirs *heirs* and assigns forever, all that certain lot, piece or parcel of land situate, lying and being in the county of Los Angeles, State of California, and bounded and particularly described as follows, to wit:

Being all the right, title and interest in and to the east half of the northwest quarter of section twenty-five (25), township one (1), north range nine (9) west, San Bernardino base and meridian. This conveyance being subject to the terms and conditions of the agreement marked Exhibit A, attached hereto and hereby made a part hereof.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

23 To have and to hold all and singular the said premises, together with the appurtenances, unto the said party of the second part and to his heirs and assigns forever. Subject to the terms of said agreement marked Exhibit (A).

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

JACOB HECKENLIVELY. [SEAL.]

Signed, sealed and delivered in the presence of—
J. M. VOSS.

Duly acknowledged by Jacob Heckenlively, Dec. 14th, 1887, before Rob't N. Bulla, N. P.

EXHIBIT "A."

This agreement entered into this 6 day of December, 1887, between J. Heckenlively the party of the first part and S. P. Cushman the party of the second part both of Los Angeles county, California, witnesseth:

That the said party of the first part hereby binds himself and agrees within ten days from this date to bargain, sell and convey all of his right, title and interest in and to the east half of the northwest quarter of section twenty-five (25) township one (1) north range nine (9) west, San Bernardino base and meridian in Los Angeles county, State of California, and also the one inch of water already in sight and developed on said tract of land in consideration of said agreement on the part of the party of the first part, the party of the second part has this day paid the said

first party two hundred dollars, and should said first party's equitable title to said land as purchased from the
24 Southern Pacific Railroad Company prove to be unincumbered by himself or W. D. Noland, the said first party on or before ten days from this date upon the said first party executing and delivering to said second party a good & sufficient instrument conveying and assigning his interest in said land above set forth, agrees to pay said first party eight hundred dollars which is to be in full for said eighty acres & one inch of water now developed, and the said second party for a like consideration agrees & binds himself to employ a competent engineer, one that shall also be acceptable to said first party to go upon said land to further develop the water and said engineer is to continue with the developement of said water as long as in his judgment he is justified in continuing the developement, taking into consideration the prospect of further developement and the cost thereof, and when said water is so developed the said second party agrees to pay said first party five hundred dollars an inch for every inch of water so developed in addition to the inch already developed on above land.

The said first and second parties have hereunto set their hands & seals the day & date above written.

JACOB HECKENLIVELY. [SEAL.]
S. P. CUSHMAN. [SEAL.]

Witness:
J. A. ANDERSON.

Duly acknowledged before Rob't N. Bulla, notary public, Dec. 14, 1887.

It is further agreed by and between the above-named parties,
25 that they each of them pay jointly to the Southern Pacific Railroad Company the sum of sixty-four — $64.10 being the sum due said company as a balance on sec. twenty-five township one (1) north, range nine west, San Bernardino base and meridian, containing 160 acres.

JACOB HECKENLIVELY.
S. P. CUSHMAN.

Duly acknowledged by Jacob Heckenlively & S. P. Cushman, Dec. 14. 1887, before Rob't N. Bulla, notary public.

A full true and correct copy of the original record at request of S. P. Cushman, December 16, 1887, 14 min. past 11 a. m. Frank A. Gibson, county recorder, by J. R. McKee, deputy.

and also a deed from Cushman to plaintiff, of which instrument the following is a copy:

This indenture, made the twenty-ninth day of August, in the year of our Lord one thousand eight hundred and eighty-eight; between S. P. Cushman, of the city and county of Los Angeles, California, the party of the first part, and the San Jose Land and Water Company, a corporation, orgainized under the laws of the State of

California, the party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of five hundred and fifty dollars, gold coin of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain and sell, convey and confirm, unto the said party of the
26 second part, and to its successors and assigns forever, all that certain lot and parcel of land situate, lying and being in the county of Los Angeles, State of California, and bounded and particularly described as follows, to wit:

The east half of the northwest quarter of section twenty-five (25) township one (1) north of range nine (9) west, San Bernardino base and meridian.

Together with all and singular the tenements, hereditiments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

To have and to hold all and singular the said premises, together with the appurtenances unto the said party of the second part and to its successors and assigns forever.

In witness whereof, the said party of the first — has hereunto set his hand and seal, the day and year first above written.

Signed, sealed and delivered in the presence of

S. P. CUSHMAN. [SEAL.]

Duly acknowledged Aug. 30, 1888, before Wm. S. Waters, notary public.

Plaintiff also introduced in evidence a notice from the plaintiff to defendant, of which said instrument the following is a copy:

To the San Jose Ranch Company and R. F. Lotspitch, president of said company:

You are hereby notified that you are now occupying a portion of the east ½ of the northwest quarter of section 25, T. 1 N.
27 of R. 9 west, S. B. & M., in Los Angeles county, State of California, with a water pipe and a brick and stone water catchment. The occupying of said lands by you with said pipes and water catchment is without right or license from the present owner of said lands, The San Jose Land and Water Company, a corporation, and is without right or license from any former owner of said lands. You are requested to remove said pipes and catchment from the above-described land within ten days from the receipt of this notice, and if not removed within that time, this company will be compelled to remove the same.

SAN JOSE LAND AND WATER COMPANY,
By its president, T. W. BROOKS.

W. F. EATON, *Secretary.*

J. HECKENLIVELY, was then sworn in behalf of the plaintiff and testified as follows:

A. Some time in 1887 the defendant in this action put a box on the land claimed, and when I saw him putting in the box I forbid them going any further with the work.

Q. On the northwest quarter?

A. Yes sir.

Q. How far from the line?

A. About eighty feet I judge, west of the east line, probably a hundred yards north of the south line of the land.

Q. What did you say to them about it?

A. I put up a notice on a tree and forbid them. They left for the present. When I went back again they were working and said to me that they were told to go ahead with the work and
28 that I had no business there, and I told them that we would have trouble about it.

Q. Did they complete the box there?

A. Yes, sir; they finished up the work.

(Witness then identified the contract between himself and the railroad company.)

The notice I put up was on a live-oak tree right close to the work, forbidding them to go ahead with the work and trespassing upon the land.

The plaintiff then offered in evidence a map which is hereunto annexed and marked Exhibit "B."

T. W. BROOKS testified as follows:

A. "I know where the line runs between the O'Donnel tract and the Heckenlively tract. The forebay of the San Jose Ranch Company or point of diversion is on the west of the north and south line between those tracts about forty-five to fifty-five feet from it. I examined the five-inch-pipe lines laid down by Stowell quite a number of times—probably four to six times rather definitely and at other times indefinitely. That was the pipe at the head near where this forebay is now situated. At that time the pipe, as well as I can recollect and judge from the appearance, is probably an eight-inch pipe. It is of concrete, and that pipe had its connection with a little iron pipe or five-inch pipe that conveyed the water to Mr. Bixby and Mr. Young and Mr. Goodrich's places. I saw the Haynes ditch in 1883 when I passed up the cañon just above the point where the ditch was taken out of the main run. I
29 passed on the west side and recrossed to the east side of the running water just above where I saw marks of the old Haynes ditch where it was taken out of the cañon or out of the stream. I judge it was about two hundred feet above the forebay of the plaintiff, as at present situated. After leaving that forebay the stream bears a little west of south. There is a little curve in the stream near that place where the marks of the old ditch was

taken out of the stream. Along in 1884, or not later than 1885, I passed up the cañon over the newly built road which was built by O'Donnel. On the east side that road was built over the Haynes ditch, destroying the ditch. That old Haynes ditch has not been used since I first saw it."

The following affidavit was admitted in evidence:

(Title of Court and Cause.)

STATE OF CALIFORNIA, } ss:
County of Los Angeles, }

Jacob Heckenlively, being duly sworn, deposes and says, that on the 28th day of February, 1887, he bought the N. W. ¼ of sec. 25 T. one N. R. nine W. S. B. M. from the Southern Pacific Railroad Company.

That said railroad company sold the same to him and gave to him a contract for a deed in the usual form given by said corporation upon the sale of its said lands.

By said contract affiant was to pay $160 for said tract of land, as follows, to wit, one-fifth on the delivery of the contract, and also the interest for one year on the balance, and the
30 balance in five years from the date of the contract with 7 per cent. interest thereon, payable yearly in advance.

That on the day of sale affiant paid said railroad Co., the said one-fifth of the purchase price in cash, and the said one years interest on the balance.

That said tract of land was sold to him by the Southern Pacific Railroad Company as a part of its grant to aid in building its branch line granted to it by act of Congress, approved March 3rd, 1871, and said tract is one of the numbered sections prescribed in said grant and is cotenninous with the constructed part of said branch road of said company, and that the same had been at the date of said sale selected and listed by said company, and certified by the register and receiver of this office, and said tract of land was not conveyed to said company, but was excepted from the operation of the grant to said company, because it was within the limits of the grant made to the Atlantic & Pacific Railroad Company by the act of Congress approved July 26th, 1866.

That at the time said tract of land was sold to affiant no part of it was in the *bona fide* occupation of any adverse claimant under the pre-emption or homestead laws of the United States, and no part of same had been settled upon at the date of said purchase, or on the 3rd of March, 1887, and subsequent to the first of December, 1882, by any person claiming to enter same under the settlement laws of the United States, and that affiant was a native-born citizen
31 of the United States, and that he purchased said tract of land from the said railroad company in good faith, believing that the said company had, by virtue of its said grant, the right to sell said tract of land.

(Signed) JACOB HECKENLIVELY.

Subscribed and sworn to before me this — day of November, A. D. 1897.

——— ———,
Notary Public in and for the County of Los Angeles, State of California.

We consent that this may be filed in lieu of original.
W. CHAPMAN.

N. W. STOWELL, called as a witness for the defendant, testified as follows:

Am acquainted with the San Dimas canyon. First knew it in 1875; and was about there from 1877 to 1883. Am acquainted with the ditches connecting with the San Dimas creek, for the purpose of diverting water. I know the old ditch. Used to know the land in section 25, the southeast quarter, and used the water of the creek for irrigation in section 25 first, and afterwards in section 36, and section 1, in the township below. Diverted water in an open ditch for years and afterwards there was a pipe put in in addition to it. That ditch connected with the stream a little above the center point of the section, I think about five or six or eight hundred feet above the center of section 25. I sold out in '83. The change was made from the ditch to the pipe, I think, in 1878, that the first pipe was
32 put in, but we also used the old ditch at the same time, the pipe connected with the stream a little below the original dam that connected with the ditch and then the pipe was connected with the ditch. We used to build a dam there every year, but when the pipe was laid the dam that was used was about the same point, which was a hugh boulder, that the old dam that was used with the ditch was, and up to the time I left there we continued to divert it about the same point. It didn't vary more than fifty feet from it. The point of diversion at the last time I was there, I should say, 150 or 200 feet below where it was originally. I did some work there in '84, and I think, in '87. There were branch pipes put in in '83, running along on bed rock of the creek and some of them were used just as the feeders spread out in order to catch the water on the bed rock. The dam in the winter of '82 and '83 was at the same point where it had always been, at the big rock. I don't think there was any dam ever put in to amount to anything, after that one. I don't remember of seeing any. When I was up there, there was part of the water running by and part of it running in what seemed to be * * * there wasn't much dam about it, but just a little sand thrown up, and it was running into the pipe. During the time I knew the stream, there wasn't a very long time that the water didn't flow down to the dam, more or less. The time I first went there the ditch which was there was one used on my own land. The
33 pipe was used by different parties between '78 and '83, perhaps a dozen different parties that used the water through the pipe. I first purchased of John Haynes the water right. There was no pipe laid there till I laid the five-inch pipe, which was in '78 or '9, and those pipes were laid so that they could connect either

with the stream or the Haynes ditch. There was a ten-inch pipe laid, but not in the creek. The ten-inch pipe was on some of the land in section 25 that I bought from Haynes. The canyon pipe was a 12-inch pipe, out upon this quarter section that I bought from Haynes, and from there down it was a ten-inch. The 12-inch pipe was laid in '83.

A deed was here offered in evidence from John W. Haynes to N. W. Stowell, of date September 13th, 1878, recorded in Book 65, of Deeds, at page 45, and was a conveyance of the tract of land referred to by the witness, of the southeast quarter of section 25, and the right thus conveyed to Stowell was subsequently conveyed to the defendant in this action and before the commencement of the action.

The witness continued: I posted several notices of appropriation and some work was done under all those notices, but the water never was got out and delivered under any of them. I claim simply under the Haynes water right. That is the only water right I ever claimed under. Those notices were posted, most of them, before I bought the Haynes right, and Haynes claimed all the right and said that he had used it, so we had no further work to do under these notices,
34 was my opinion. After I bought the Haynes right all the water was used while there was any water there that we could get through the ditch and pipe. Usually there was water until June, nearly every year; there would not be enough, though, to fill the ditch and pipe both. We always got water enough for domestic purposes through the pipe. From '78 to '83 there was always enough to keep what orchards there was in that neighborhood alive.

Cross-examination:

After I bought out Haynes, we laid that five-inch pipe. That was below the big boulder. We put it in the ground there below the big boulder. I think there was about three miles of pipe altogether. It went over into section 6. Before I sold out I always ran water out every spring when there was plenty of water in the ditch. I don't think I had in any more alfalfa than Haynes did. The alfalfa patch was within 1,500 or 1,800 feet of the place of diversion. From the granite rock, the point of diversion of the old ditch, to where the connection was made between the old ditch and the pipe, was about 200 feet, and the old ditch and pipe were connected about where the forebay is now. The length of the connection between the ditch and the forebay I would think is not over 10 feet. The old Haynes ditch, as it ran down, is within 10 feet on the line of the five-inch pipe. I bought the northeast quarter of section 25, I had no title to it except what I got from the railroad company. I sold it to a man of the name of O'Donnel. I also got with the deed
35 from the railroad company the relinquishment from the railroad company to the United States. I gave O'Donnel the deed, reserving all his rights for his ditches. I bought the southeast quarter of Haynes.

The defense read in evidence the deposition of DAVID O'DONNEL, who testified as follows: I formerly owned the northeast quarter of section 25, township 1 north, range 9 west, S. B. M. Settled on the land in 1882, and in July, '83, left it. Am acquainted with the San Dimas creek that flowed through the land. In the winter of '82 and '3 Stowell put in a cement pipe. The point of diversion was near the southwest corner of my place. The pipe was about 12 inches in diameter at the point of diversion and tapered to about six inches. There was an old ditch, partially of pipe, taking water out of the creek below where the new one was placed, when I first moved on the northeast quarter, but was abandoned when the new one was put in.

Defendant also read in evidence the deposition of J. W. HAYNES, who testified as follows: Settled in the San Dimas canyon in 1869, November. Settled on section 25, the southeast quarter. Got the title to that quarter section. Got a patent either in August or September, 1878. Used water from the San Dimas creek to irrigate the land; made a dam and a ditch, and ran it down to the ranch. Can't say exactly how far the ditch was; probably might have been a little over a quarter of a mile, and might have been in the neighborhood of half a mile. I made the ditch; Mr. Martin
36 helped me some, but the ditch was made for my purpose. Turned the water out at the narrows of the canyon. The dam was above the north bound-ry of my tract—about 300 yards from my line, where I made the dam. Built the dam with brush and rock and sand; used it up to the spring of 1878. Commenced using in March, 1870. No one else lived in the canyon at that time, except Mr. Martin, who lived a mile below me. No one else used water from the canyon while I was there, except on the Chappel place. Chappel settled there two or three years afterwards, and talked with me about the water, and I told him I had no objection to his using it, because when he used it on his sandy land it ran right back into the creek, and he didn't have more than two acres, more or less, to use the water from the canyon. I am a native-born citizen of the United States. Maintained my dam in the creek all the time, and cleaned the creek out. Took out the drift. When the water fell I went and cleaned out the creek and kept the dam. Never relinquished my claim to the dam until I sold it.

Cross-examination:

Used the water for alfalfa and nothing else. I sold out to Stowell. I was back there in June, 1879. I had to repair the dam every spring, but I kept it up all the time. I got a patent for the land before I left, and sold it to Stowell and conveyed it to him by a deed.

Evidence was also introduced showing that the title of
37 Stowell had vested in the San Jose Ranch Company.

The plaintiff now assigns as error on said statement that there is no evidence sustaining the finding that the plaintiff did not

own the property described in the complaint, and in the findings of the court. That the evidence clearly established the fact that the plaintiff and its vendor both purchased the property in good faith, believing the title of the railroad company thereto to be valid, and had taken possession and made improvements upon said property and expended money thereon in good faith. That under and by virtue of the laws of the United States they were entitled to purchase said property when the same came to the market, which right to purchase was good against the whole world, and could not be taken away from plaintiff, either by a purchaser in good faith, or by such trespasses as would deprive the plaintiff of his rights by the statutes of limitation; all of which appears from the testimony in the case.

Plaintiff assigns as further error, that the decision and judgment of the court were contrary to the law in this: that it appears from the undisputed evidence in the case that the plaintiff and its vendors were *bona fide* purchasers and in possession of the property, and entitled to purchase the same from the Government of the United States when the same came into the market; yet under this issue, which was material, and which was supported by abundant evidence showing the said facts, the court has failed to make any finding at all, and for this reason the plaintiff claims that it is entitled to a new trial in said cause.

38 (Title of Court and Cause.)

It is hereby stipulated in the above-entitled actions that the E. ½ of the N. W. ¼ of section 25, T. 1 N., R. 9 W., S. B. M. is within ten miles of the Southern Pacific railroad as shown by its location map filed in the office of the Commissioner of the General Land Office pursuant to act of Congress of March 3rd, 1871, entitled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes."

That a corporation entitled the "Southern Pacific Railroad Company" was created and organized under the laws of California by articles of incorporation dated December 9th, 1865, for the purpose of constructing, owning and operating a railroad from some point on the bay of San Francisco in the State of California, and to pass through the counties of Santa Clara, Monterey, San Luis Obispo, Los Angeles and San Diego to the eastern line of the State of California.

That said company was not authorized by said articles nor by the laws of California, to construct a railroad from Tehachapi by way of Los Angeles to the Colorado river.

That said company accepted the grant, rights and franchises granted by said act of Congress approved March 3rd, 1871, and duly filed its location of route on the 3rd day of April, 1871.

That on the 12th day of August, 1873, a company was organized under the laws of California, by the consolidation of the
39 Southern Pacific Company and the Southern Pacific Branch Railroad Company, with articles of incorporation dated

August 12, 1873, which provided for the formation of a new corporation to be known as the Southern Pacific Railroad Company to endure for fifty years from the date of said articles, with a capital stock of ninety instead of 70 millions of dollars, as under the old articles of 1865, and providing for the issue of new stock and the surrender of shares held in the old contracting companies, and for the transfer to the new company of all property, franchises, rights, &c. of both companies.

That a transfer and consolidation was actually made and said new company took control of both roads, and between the years 1874 and 1879 built a railroad from Tehachapi pass by way of Los Angeles to Yuma, and the construction thereof has accepted, approved by the President of the United States as having been done in pursuance of act of Congress approved March 3rd, 1871.

That said corporation is at present the corporation under which the San Jose Land and Water Company claims.

That said company selected the said tract of land claiming the same to belong to it under act of Congress of March 3rd, 1871.

That said tract of land is within the — limits of the land grant of the Atlantic and Pacific Railroad Company under the act of Congress approved July 27th, 1866, as shown by its designated route of its road-bed filed in the office of the Commissioner of the General Land Office on or about the 12th day of March, 1872, and said land grant was duly accepted by said Atlantic and Pacific Railroad Company.

That said Atlantic and Pacific Railroad Company never complied with the terms of said land grant, and never built its said road beside said land, and that Congress passed an act, approved July 6th, 1886, entitled "An act to forfeit the lands granted to the Atlantic and Pacific Railroad Company to aid in the construction of the railroad and telegraph line from the State of Missouri and Arkansas to the Pacific coast, and to restore to settlement and for other purposes."

That said quarter section of land is non-mineral and is unpatented.

(Signed) ANDERSON, FITZGERALD & ANDERSON &
R. DUNNIGAN,
Attorneys for San Jose Land & Water Co.
CHAPMAN & HENDRICK AND
WALTER J. HUGHES,
Att'ys for S. J. Ranch Co.

On the 15th day of April, 1871, the Southern Pacific R. R. Co. filed its amended articles of incorporation in the office of the secretary of the State of California. Under these amended articles of association the Southern Pacific R. R. Co. recites the act of the State of California, entitled, An act relating to certificates of incorporation, passed March 1st, 1890, and also an act of the legislature of the State of California, "An act to aid in giving effect to an act of Congress

relating to the Southern Pacific R. R. Co.," passed April 4th,
41 1870, and also reciting the act of Congress of July 27th, 1866 (the Atlantic & Pacific act), and also reciting the act of Congress of March 3rd, 1871, (the Texas Pacific act) and further reciting: "That whereas, the said Southern Pacific R. R. Co. desires to secure to itself the grants, rights and privileges conferred upon it by said act of Congress of the U. S. and to that end to alter and amend its articles of association as provided in the foregoing acts of the legislature of the State of California, so as to include in its line of railroad and telegraph, the line or route designated in the aforesaid act of Congress of March 3rd, 1871, to wit: the line from a point at or near Tehachapi pass, by way of Los Angeles to Texas Pacific R. R. at or near the Colorado river," also reciting the unanimous vote of the board of directors that the articles of the association of said company should be amended, further reciting that at a stockholders' meeting at which more than two-thirds of the capital stock was present, there was an unanimous vote in favor of amending the articles of association.

Article 3 of the amended articles of association state- to the effect that the objects of the same are to purchase, construct, own and maintain and operate a continuous line of railroad from the city of San Francisco in the State of California through the city and county of San Francisco, the counties of San Mateo, Santa Clara, Monterey, Fresno, Tulare, Kern, San Bernardino and San Diego, to some point on the Colorado river, in the southeasterly part of the State
42 of California, a distance of 320 miles as near as may be, also a line of road from a point at or near Tehachapi pass by way of Los Angeles to the Texas and Pacific railroad at or near the Colorado river a distance of 324 miles, as near as may be, also a minor line of road in the county of Santa Clara; also such branches of said lines as the board of directors may consider advantageous.

The capital stock of the corporation is put at $70,000.

It is admitted that all the provisions of the law were fully complied with in order to give effect to the new articles of association and the said amendment.

Again, on the 12th day of August, 1873, further articles of association, amalgamation and association, were made and executed by and between the Southern Pacific Railroad Co. and Southern Pacific Branch R. R. Co.

(See Master's Ex. 125.)

At this point in the statement there appears the same matter herein contained in this statement on motion for a new trial, commencing on line — page — of this transcript, and ending at line — page — of this transcript.

G–291. (1–9, '87. 500.)

Southern Pacific Railroad Company, land department.

No. 6365. Ex. A.

This agreement, made in San Francisco, California, this twenty-eighth (28) day of February, A. D. 1887, between the Southern
43 Pacific Railroad Company, party of the first part, and W. D. Nolan and J. Heckenlively, of the county of Los Angeles, State of California, parties of the second part,

Witnesseth that the party of the first part in consideration of the covenants and agreements of the parties of the second part, hereinafter contained, agrees to sell to the parties of the second part the following tract of land, situated in the county of Los Angeles, State of California, and known and designated on the public surveys of the United States as the northwest quarter (N. W. ¼) of section twenty-five (25) township one (1) north, range nine (9) west, San Bernardino base and meridian, containing one hundred and sixty (160) acres, for the sum of one hundred and sixty (160) dollars, gold coin of the United States.

And the parties of the second part, in consideration of the premises, agree to buy the land hereinafter described and to pay to the party of the first part the said sum of one hundred and sixty ($160) $\frac{00}{100}$ dollars; as follows, to wit: thirty-two ($32) $\frac{00}{100}$ dollars; and also $8.96, one year's interest in advance on the remainder, in United States gold coin of the present standard of value, on the execution of this contract (which two last-mentioned sums have this day been fully paid), and the remainder to wit: the sum of one hundred and twenty-eight ($128.00) dollars with interest thereon, annually in advance at the rate of seven per cent. per annum, both in United States gold coin of the present standard of value, at its office
44 in the city and county of San Francisco, on or before the 28th day of February, 1892; and also to pay all taxes and assessments that may at any time be levied or imposed upon said premises, or any part thereof; and if the parties of the second part shall fail to pay such taxes or assessments or any part thereof at any time when the same shall become due, then the said party of the first — may pay the same; and all sums so paid by the party of the first part shall be added to and become a part of the unpaid remainder, and shall bear interest at the same rate, and be paid in the same manner and at the same time and place hereinbefore provided for the payment of said remainder and the interest thereon.

It is further agreed, that upon the punctual payment of said purchase-money, interest, taxes and assessments, and the strict and faithful performance by the parties of the second part, their legal representatives or assigns, of all the agreements herein contained, the party of the first part will, after the receipt of a patent thereof from the United States, upon demand and the surrender of this instrument, execute to the party of the second part, their heirs and assigns a grant, bargain and sale deed of said premises, reserving all claim of the United States to the same as mineral land.

It is further agreed that until the full payment of said purchase-money, interest, taxes and assessments, no strip or waste shall be made on said premises, and that no wood or growing trees shall be cut thereon, except for necessary fuel for the family of the
45 legal occupant under this contract, and for the erection of buildings or fences on said land without the previous written consent of the parties of the first part.

It is further agreed that the parties of the second part may at once enter upon, take and hold possession of said premises provided, however, that if the parties of the second part shall fail to make any of said payments of remainder, or interest, taxes or assessments, as herein provided, or shall fail to comply strictly with any of the stipulations of this contract, then this right shall cease, and the party of the first part, its successors or assigns may, without notice, enter upon, take and hold possession of the said premises with all the improvements thereon.

It is further agreed, between the parties hereto that the party of the first part claims all the tracts hereinbefore described as part of a grant of lands to it by the Congress of the United States; that patent has not yet issued to it for said tracts; that it will use ordinary diligence to procure patents for them; that as, in consequence of the circumstances beyond its control, it sometimes fails to obtain patent for lands that seem to be legally a portion of its said grant; therefore nothing in this instrument shall be considered a guaranty or assurance that patent or title will be procured; that in case it be finally determined that patent shall not issue to said party of the first part for all or any of the tracts herein described, it will upon demand repay (without interest) to the parties of the second
46 part all moneys that may have been paid to it by them on account of any of such tracts as it shall fail to procure patent for, the amount of repayment to be calculated at the rate and price per acre fixed at this date for said tracts by said party of the first part, as per schedule on page 3 hereof; that said lands being unpatented the party of the first part does not guaranty the possession of them to the parties of the second part, and will not be responsible to them for damages or costs in case of their failure to obtain and keep such possession.

It is further agreed, that if the party of the first part shall obtain patent for part of the lands herein described and shall fail to obtain patent for the remainder of them, this contract shall in all its provisions be and remain in full force and virtue as to the tracts patented, and shall except as to repayments herein provided for, be null and void as regards those tracts for which it shall be finally determined that patents cannot be obtained.

It is further agreed, that the parties of the second part will never deny that the tracts herein described, or any part of them, are a part of said grant, and will do no act to hinder, delay or impede the obtaining of patent for them by the party of the first part; and that they will not obtain or hold possession of all or any of them adversely to said party of the first part.

It is further agreed, that this contract shall not be assignable, ex-

cept by endorsement, and with the written consent of the
47 party of the first part, and the written promise of the assignee to perform all the undertakings and promises of the parties of the second part as above set forth.

It is further agreed, that the parties of the second part shall pay $300 for expenses of the acknowledgements to the deed that shall be issued on this contract.

In testimony whereof, the party of the first part has caused these presents to be signed in duplicate by its secretary and land agent, and the parties of the second part have signed their names hereto.

JEROME NADDEN, *Land Agent.*

J. S. WILLCUTT, *Secretary.*

his
W. D. x NOLAN. [SEAL.]
mark.
JACOB HECKENLIVELY. [SEAL.]

Signed, sealed and delivered in the presence of—
C. CABOT.

Schedule of Prices at which the Lands Described in this Contract have been Sold this Twenty-eighth (28) Day of February, 1887.

Fraction.	Sec.	Tp.	Range.	B. & M.	No. of acres.	Rate per acre.	Amount.
N. W. ¼	25	1 N.	9 W.	S. B.	160	1.00	$160.00

JEROME MADDEN,
Land Agent.

I, W. D. Nolan, one of the parties of the second part in the within contract No. 6365, for and in consideration of two hundred and fifty dollars to me in hand paid, do hereby sell, assign and transfer
48 all my right, title, interest and claim, in and to the within-described tract or parcel of land and the within contract No. 6365, unto J. Heckenlively, his heirs and assign- forever, subject to the stipulations and conditions therein contained, which are to be performed by said assignee.

Given under my hand and seal this 20th day of July, A. D. 1897.

his
W. D. x NOLAN. [SEAL.]
mark.

Witness: J. A. Clarke, who wrote the name of W. D. Nolan at his request and saw him make his mark.

Duly acknowledged by W. D. Nolan before J. A. Clarke, notary public, July 20, 1887.

I, Jacob Heckenlively, one of the parties of the second part in the within contract No. 6365, for and in consideration of one thousand dollars to me in hand paid, do hereby sell, assign and transfer the east half of the within-described tract or parcel of land, subject to the conditions of the within contract.

Given under my hand and seal this 14th day of December, A. D. 1887.

JACOB HECKENLIVELY.

Signed in pres. of
J. M. VOSS.

Endorsed.

Interest $8.96 due on the 28th day of Feb'y of each year.
Remainder of principal $128.00 due on the 28th day of February, 1892.

49 Settled and allowed this 14th day of Feb., 1898.

W. H. CLARK, *Judge.*

Endorsed: Filed Feb. 14, 1898. T. E. Newlin, clerk, by C. W. Blake, deputy.

(Title of Cause.)

Order Denying Motion for New Trial.

TUESDAY, *October* 10, 1899.

Superior Court, Dept. 2.

Plaintiff's motion for a new trial on the grounds stated in his notice of motion filed herein, argued and submitted October 9, 1899, is this day by the court denied.

(Title of Court and Cause.)

Notice of Appeal.

Take notice that the plaintiff in the above-entitled action hereby appeals to the supreme court of the State of California, from the judgment therein given, made and entered in the said superior court, on the 12 day of March, 1897, in favor of the defendant in said action, and against said plaintiff and from the whole of said judgment.

Yours, &c.,

ANDERSON, FITZGERALD AND ANDERSON,
R. DUNNIGAN,
Attorneys for Plaintiff.

To the clerk of said superior court and Chapman & Hendricks, Esq., attorneys for defendant.

50 Dated this — day of March, A. D., 1898.

Endorsed: Service and receipt of a copy of the within noticee of appeal after filing is hereby admitted this 8 day of March, 1898. J. S. Chapman, attorney for def't. Filed Mar. 8, 1898. T. E. Newlin, clerk, by C. G. Keyes, deputy.

(Title of Court and Cause.)

Notice of Appeal.

To the clerk of said superior court and to the defendant in the above-entitled cause and to John S. Chapman, its attorney:

You will please take notice that the plaintiff in the above-entitled cause does hereby appeal to the supreme court of the State of California from the judgment and order of the superior court of the State of California, made and entered on the 10 day of October, 1899, denying the plaintiff's motion for a new trial in the above-entitled cause; and the said plaintiff appeals from the whole of said order made and entered by the superior court, department 2, on the 10 day of October, 1899.

Dated, this 24th day of October, 1899.

ANDERSON & ANDERSON,
R. DUNNIGAN,
Attorneys for Plaintiff.

Endorsed: Service of the within admitted this 24th day of October, 1899. J. S. Chapman, attorney for defendants. Filed Oct. 24, 1899. C. W. Bell, clerk, by C. G. Keyes, deputy.

51 (Title of Court and Cause.)

Stipulation.

It is hereby stipulated and agreed by and between the attorneys for the appellants and respondents in the above-entitled cause that the foregoing printed pages contain full, true and correct copies of the complaint, amended answer to the complaint, findings of fact, decree, plaintiffs' statement on motion for a new trial, order denying motion for new trial and notice of appeal from judgment, and notice of appeal from order denying motion for a new trial, as the same appear of record in the office of the county clerk of Los Angeles county, State of California, and being filed in the records of the superior court of said county, and that the same shall constitute the transcript on appeals, and that both appeals may be heard on the foregoing transcript.

It is further stipulated that good and sufficient undertakings on appeals, upon each appeal in due form, were properly filed within the time required by law.

ANDERSON & ANDERSON AND
R. DUNNIGAN,
Attorneys for Plaintiffs and Appellants.
JOHN S. CHAPMAN,
Attorney for Defendants and Respondents.

52 Due service of the within, and receipt of a copy hereof acknowledged this 2nd day of December, 1899.

J. S. CHAPMAN,
Attorney for Respondents.

I hereby certify that a copy of the within was deposited with me this 2nd day of December 1899, to be delivered to the judge who presided at the trial of said cause in the superior court of the county of Los Angeles, State of California.

C. W. BELL, *Clerk*,
By D. S. BURSON, JR., *Deputy*.

154 Filed Sept. 13, 1900. Geo. W. Root, Clerk, by A. E. Hornlein, Deputy.

Department Two.

SAN JOSE LAND & WATER COMPANY, Plaintiff and Appellant,
v.
SAN JOSE RANCH COMPANY, Defendant and Respondent.
} L. A. No. 858.

Action to quiet title to the E. ½ of N. W. ¼ sec. 25 tp. 1 N. R. 9 W. situated in Los Angeles county and of which plaintiff claims to be the owner. Defendant denied plaintiff's ownership and denied that defendant claims any interest in the land except "the right to maintain in San Dimas creek (which flows over said land) a dam at a point about 100 yards northerly from the center of said section 25, and to maintain pipes connecting with the said creek at the said dam for the purpose of conducting the waters of said creek to lands below the said section 25, for the purpose of irrigation and for domestic use" and denies that its said claim is without right. Defendant also pleaded sec. 318, C. C. P., as a bar to the action. For a third defense defendant alleges that in 1868 one J. W. Hanes settled upon a tract of land at the mouth of San Dimas cañon and near the center of said section 25, claiming the same for cultivation and grazing and on September 23, 1870, he caused to be recorded in county recorder's office
155 in said county a possessory claim under the act approved April 20th, 1852, and acts amendatory thereof, setting forth in his affidavit claiming the land the requisite facts; that he at the same time claimed the waters of said creek for the purposes aforesaid and had prior to said time entered upon said creek at a point about 100 yards north of the north boundary line of the S. E. ¼ of said section and about 20 feet west of the north and south line through the center of said section, and constructed a dam, and a ditch connected with said creek at a point immediately above said dam and extending down to and upon the land so claimed by him for the purpose of diverting the waters of said stream and by means thereof did divert the waters of said stream to and upon the land occupied by him and used the same for irrigation and domestic purposes; that the said ditch and the pipes subsequently laid along the course thereof have been continuously used by defendant and its grantors and predecessors from said time in 1870 to the commencement of this action for said purposes on said lands and for like purposes on other lands in the vicinity of said S. E. ¼ of said

section 25; that at the time of said appropriation and the location of said land said section 25 was unsurveyed public land and defendant has succeeded by mesne conveyances to all the right and interest of said Hanes in said dam and ditches, pipes, rights of way and easements upon said section 25, and it and its grantors and predecessors have ever since 1870 been in the open, uninterrupted and notorious and adverse use of said dam, ditches and pipes, under a claim of right adversely to plaintiff and all the world and defendant disclaims any other right to said E. ½ of the N. W. ¼ of said section.
156 The cause was tried by the court and defendant had judgment; that plaintiff is not the owner of the land claimed by it and that defendant recover its costs. There was evidence tending to establish the first and third defenses set up.

It appears from the findings and evidence that the land was within the indemnity limits of the grant to the Atlantic and Pacific Railroad Company under the act of July 26th, 1866, (14 U. S. Stats. p. 292); that company failed to build its road and its grant was forfeited by act of Congress of July 6th, 1866 (24th U. S. Stats. p. 123), and the land was restored to the public domain. The land in question was also within the ten-mile limits of the grant of land to the Texas and Pacific Railroad Company by act of March 3rd, 1871, (16 U. S. Stats., p. 573); by the terms of that act the Southern Pacific Railroad Company was authorized to construct a line from Tehachapi pass, by the way of Los Angeles, to the Texas and Pacific railroad at or near the Colorado river with the same rights as had been granted to the latter company; the Southern Pacific Railroad Company constructed its line to Yuma between 1874 and 1879 and pursuant to the act of 1871, selected the land in controversy; the land was unpatented and non-mineral; on February 28th, 1887, the latter company entered into a contract of sale and purchase of the N. W. ¼ of said section with W. D. Noland and Jacob Heckenlively; for $160; they paid $32 as first payment of the principal and one year's interest in advance and agreed to pay $128 within five years and interest annually which latter was paid to February, 1892, and no further payments of principal or interest were made: N. & H. were citizens of the United States and purchased the land from the company in good faith; it was not then occupied by
157 any *bona fide* claimant under the pre-emption or homestead laws and had not been settled upon at the date of the purchase, or on March 3rd, 1887, or subsequent to Dec. 1st, 1882, under the settlement laws of the United States; neither N. nor H. nor any of their assigns ever settled on the lands, cultivated or fenced any part thereof, but H. "did under said agreement of purchase shortly after it was executed (which was February 28th, 1887), enter upon said land and commence the construction of a ditch and tunnel thereon." There is no evidence in the record as to where Heckenlively entered upon the land for the purpose stated, how long he remained or the extent of any work done by him in the construction of a ditch or tunnel, or the extent of his possession of the land. Noland on Dec. 6th, 1887, assigned his interest in the contract to Heckenlively; Dec. 14th, 1887, H. conveyed by grant deed to one

Cushman the land in controversy, and on Aug. 29th, 1888, C. conveyed by grant deed to plaintiff the same land. The court finds that in and prior to the months of November and December, 1883, one N. W. Stowell owned, or claimed to own a certain water right in the waters of said creek, "the character and extent of which water right the court does not now find or adjudicate" and that in said months Stowell laid and constructed across a portion of said land a 12-inch-pipe line to conduct water across said land to the S. E. ¼ of said section and to other lands; that prior to July, 1887, the defendant had by mesne conveyances, "succeeded to and now owns the said water right owned or claimed by the said Stowell and all the right and
158 interest of the said Stowell in and to said 12-inch-pipe line;" that defendant in July and August, 1887, did enter upon the land in controversy and "did build and construct thereon at a point where the waters of said San Dimas creek flow thereon, a stone, brick and cement forebay, sand box or dam, and did lay and construct from said forebay or dam across a portion of said land a 14-inch-pipe line;" the court finds that defendant claims the right to maintain said forebay or dam and the said 14-inch-pipe line and also the 12-inch-pipe line laid by Stowell, but makes no other claim of right or title. The court does not find nor does it decree that defendant has such right; its conclusion of law is that plaintiff should take nothing by its action and the decree was that plaintiff is not the owner of the land, and that defendant have judgment for its costs.

As the court has not found upon the issues presented by the affirmative allegations of the answer, but has disposed of the case entirely on the finding that plaintiff has no title to be quieted, we shall direct our attention to that issue.

Appellant contends that if any interest in this land passed to the purchasers under the contract of Noland and Heckenlively with the railroad company then they or their vendees may protect that right by this action. The provisions of section 738 of the Code of Civil Procedure have been held to be broad enough to include an equitable title to real property, Tuffree *v.* Polhemus, 108 Cal. 670; and it may be that the right to purchase land under the act of 1887, presently to be noticed, may under some circumstances be quieted as against an unlawful trespass. The question is, Has plain-
159 tiff established a right under the allegation of ownership such as will entitle it to the relief asked? Plaintiff makes no claim under the Atlantic and Pacific Railroad Company's grant nor is the claim directly from the Texas and Pacific grant of March 3rd, 1871, of which the Southern Pacific Railroad Company availed itself by constructing its road. The court finds that this latter company made selection of this land under the act of 1871, but the court also found that the land within the ten-mile limits, — which latter fact made the selection an unnecessary proceeding if the grant had otherwise been effective. The selection gave no additional right.

When the grant was made to the Atlantic and Pacific Railroad Company the effect was to withdraw the land granted from other

disposition while that grant remained operative, both within the primary and indemnity limits, and the Southern Pacific Railroad Company took nothing by its grant and could convey nothing to Noland and Heckenlively; U. S. *v.* Southern Pacific Railroad Co., 146 U. S. 570; U. S. *v.* Colton M. L. Co., *id.* 615; Sp. Co. *v.* U. S., 168 U. S. 1; S. P. Co. *v.* Painter 113 Cal. 247. Whether defendant's predecessors could acquire any right of way or other easement, or appropriate the waters of San Dimas creek, after the grant to the Atlantic and Pacific Company, if that company had finally perfected its right to a title and had objected to such appropriation, need not be decided. While the land was withdrawn from entry under its grant it did not object to defendant's appropriation and before any rights were acquired by plaintiff's predecessors, the land was restored to the public domain and whatever rights defendant's predecessors had acquired by appropriation of water or rights
160 to make ditches and lay pipe lines, attached at once upon the forfeiture of the grant of the Atlantic and Pacific Company by the act of 1886, and the restoration of the land to the public domain. If the land had not been granted to the A. & P. Company the rights of the appropriators would have attached to the land under the act of July 26th, 1866, and amendatory acts, granting the right to construct ditches etc., and we see no reason why upon the failure of the grant and the resumption of full title by the Government that defendant's rights did not become valid from their inception. It results that whatever rights defendant acquired were undisturbed by the grant of any of these roads and but for the act of Congress, next to be noticed, these rights of defendant are indisputable. On March 3rd, 1887, Congress passed an act entitled "An act to provide for the readjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes;" 24 U. S. Stats. p. 556. The main purpose of this act was to relieve purchasers of forfeited lands. Section two provided for cancelling patents erroneously issued to any company. Section three related to *bona fide* settlers under the pre-emption or homestead laws and reinstated in their rights if their application was renewed within a reasonable time. Section four gave the right to a purchaser in good faith from the railroad company to a patent from the Government, upon making proof of such purchase within such time as might be prescribed by the Secretary of the Interior. The case before us does not come within the provisions of any of these sections.

161 Appellant claims under section five which reads as follows: "That where any company shall have sold to citizens of the United States * * * as parts of its grant, lands not conveyed to or for the use of such company, * * * and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the *bona fide* purchaser thereof from said company to make payment to the United States for said lands, at the ordinary price for like lands, and thereupon patents shall issue therefor to the said *bona fide* purchaser, his heirs or assigns." Provisos in the section except there-

from lands "in the *bona fide* occupation of adverse claimants under the pre-emption or homestead laws," etc., and also "lands settled upon subsequent to the first day of December, 1882, by persons claiming to enter the same under the settlement laws of the United States," etc. 24 U. S. Stats., p. 556.

It will be observed that this right to purchase was subordinated to the rights of claimants under the pre-emption and homestead laws and the settlement laws of the United States, from which it would seem evident that the lands were previously treated as public lands open to settlement. A purchaser from a railroad company prior to the act would gain no advantage by his purchase as against the excepted classes. And we think the right of any such purchaser who based his right solely on his contract of purchase, would be subordinate to rights of way, ditch, and water rights, previously acquired in good faith under the laws of the United States. It may be that if the purchaser from the railroad company was in actual possession of the land when the relief act of 1887 was passed, and had made or was making valuable improvements thereon in good faith, believing that he had title from the company, and he showed that he had applied to purchase, or that he intended within a reasonable time to make application to purchase under said act, the courts would protect his right as against a right acquired by another person subsequent to such possession and declared intention. But, as between a right, such as is claimed by defendant, acquired prior to the act of 1887, and prior indeed to the act of 1871, and as early as in 1870, and the right by which plaintiff claims, the former must prevail.

162

In the case before us there is no evidence that plaintiff or its predecessors are now *are* ever were in possession of the land; there is a finding that Heckenlively, shortly after he entered into the contract with the S. P. R. R. Co., "did enter upon said land and commence the construction of a ditch and tunnel thereon," but there is no evidence as to what part of the land this was or as to the extent of this temporary possession, or how long he remained or what work he did; there is no evidence that plaintiff or any of its predecessors ever applied to purchase the land or expressed an intention to do so or that plaintiff now desires to purchase or intends to purchase the land. Its right to purchase accrued, if at all, in 1887. It seems to me conceding that it has not lost this right by its delay to make application to purchase, that a court of equity ought not to grant the relief asked upon a mere right to purchase, such as is shown in this case, where it appears that plaintiff and no person under whom it claims was ever in possession of the land; is not now in possession; has never applied to purchase the land and does not show any intention to purchase it. We think there should be some more tangible right shown than appears here before a court of equity will lend its aid to quiet plaintiff's right which appears to be nothing more than an option to purchase unaccompanied by any equitable circumstances.

163

Respondent claims that the court made no findings on the facts alleged in defence—in other words, that it did not find as to defend-

ant's title. The complaint alleged ownership in plaintiff; the evidence was clearly insufficient to establish ownership; the findings of fact give all the evidence upon which the claim of plaintiff rests and the court as a conclusion of law found "that the defendant is entitled to judgment that plaintiff take nothing by its suit," and the decree adjudged "that plaintiff is not the owner" of the land in controversy. Defendant does not appeal nor complain that its title was not adjudicated. We think the findings cover all the facts on which plaintiff relied to show that it is the owner of the land; and as the facts do not support any claim of ownership, legal or equitable but do support the conclusion reached by the court we see no error in omitting to find as to defendant's title or defences.

The complaint was filed in 1889 and came on for trial in 1890. The findings were lost and the judgment was not filed and entered until March 12th, 1897. Findings were substituted by stipulation June 29th, 1899, and the appeal perfected thereafter in due time No explanation is given for the delay in having judgment entered and the findings supplied at an earlier date but no point is made by either party by reason of these facts.

164 There are numerous other interesting questions discussed in the briefs but we think the foregoing disposes of all that are necessary to the decision.

It is advised that the judgment and order be affirmed.

CHIPMAN, *C.*

We concur:
HAYNES, *C.*
GRAY, *C.*

For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFARLAND, *J.*
TEMPLE, *J.*
HENSHAW, *J.*

165 (Title of Court and Cause.)

Minutes of Court and Filings.

1899.
Dec. 2. Filed transcript..... L. A.... 10.00
" 26. " app. opening brief.....
1900.
Jan. 22. " stip. resp. 15 days add. to file brief.....
Feb. 1. " resp. brief.....
" 28. " app. reply brief.....
Ap'l 10. " closing brief of resp.....
" 11. " stip. to submit on briefs on file.....
Jun- 28. Submitted & assigned to dept. two.....
Sep. 13. Judgment and order affirmed (comm.).....

McFarland J. Temple J. Henshaw J.

Oct. 1.	Filed pet. — rehearing		L. A....	2.50
" 13.	Rehearing denied. By the court. Oct. 13, 1900....			
" 15.	Remit-ittur to county clerk			
1901.				
Apr. 15.	Filed application for writ of error		L. A....	.25
" 15.	" order granting " " "		L. A....	.25
" 15.	" undertaking		L. A....	.25
" 15.	" writ		L. A....	.25
" 15.	" præcipe		L. A....	.25

166 (Title of Court and Cause.)

Petition for Allowance of a Writ of Error to the Supreme Court of the United States.

To the Hon. W. H. Beatty, chief justice of the supreme court of the State of California:

Your petitioner respectfully represents, that on the 13th day of September 1900, a final judgment and decision was made and entered by this court in the above-entitled case, then pending on appeal herein.

That the action involves the construction and validity of a Federal statute, namely the fifth section of the act of Congress, of March 3rd 1887, entitled "An act to provide for the readjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands and for other purposes;"

That your petitioner claimed title to the land in controversy, herein, in this action under said fifth section of said act of Congress, the land being the E. ½ of the N. W. ¼ sec. 25, tp. 1 N., R. 9 W. S. B. M. situated in Los Angeles county State of California.

That the decision in this case, rendered by this court, as hereinbefore recited, was adverse to the said right claimed by your petitioner, and was adverse to the validity, force and effect, of said statute, and contrary to the true intent and meaning of said statute.

Your petitioner further represents that the judgment and
167 decision of this court, was erroneous in sustaining the decision of the trial court in holding;

First, that your petitioner, plaintiff herein, acquired no title to the lands in controversy, by virtue of its purchase in good faith from the railroad company and the operation of said statute of March 3rd, 1887.

Second, that your petitioner, plaintiff herein, did not thereby acquire sufficient title upon which to maintain an action to quiet title, under the laws of this State.

Third, that your petitioner, plaintiff herein, was not entitled to exclusive possession and control of said property.

Fourth, that your petitioner, plaintiff herein, was guilty of laches, in not applying to the Government to purchase said lands under the provisions of said act of Congress, and thereby lost any right, priveledge, immunity, or claim, to or in relation to said lands.

Fifth, that the defendant did, or could, acquire any right, claim,

title or eas-ment, in or upon said lands adverse to that of your petitioner, before your petitioner, had been afforded an opportunity to purchase said lands, as provided for in and by said act of Congress of March 3rd, 1887.

All of which was contrary to the true intent and meaning of said act of Congress of March 3rd, 1887:

Wherefore your petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to this
168 court, and for such other and further process as will enable your petitioner to obtain a review of the case and a correction of said errors, by said Supreme Court of the United States and your petitioner will ever pray etc.

ANDERSON & ANDERSON,
DUNNIGAN & DUNNIGAN,
Attorneys for Petitioner and Appellant.

Endorsed: Allowed W. H. Beatty chief justice of California. Filed Apr. 15, 1901 Geo. W. Root, clerk, by H. G. Simpson, deputy.

169 (Title of Court and Cause.)

Order Granting Writ of Error to the Supreme Court of the United States.

Upon reading the petition, and assignments of errors, of The San Jose Land and Water Company, appellants, praying for the allowance of a writ of error from the Supreme Court of the United States, to this court, to review the judgment of this court heretofore rendered, to wit, on the 13th day of September 1900, and it appearing from said petition, and the record of the case that a proper case for the allowance of said writ is presented, it is ordered that the same be, and it is hereby allowed.

Dated this April 12th 1901.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

Endorsed: Filed Apr. 15, 1901. Geo. W. Root, clerk. By H. G. Simpson, deputy.

170 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the San Jose Ranch Company, Greeting:

You are hereby admonished to be and appear at the Supreme Court of the United States at the city of Washington D. C. within thirty days from the date of this writ pursuant to a writ of error filed in the clerk's office of the said Supreme Court of the United States wherein The San Jose Land and Water Company is plaintiff in error and you are defendant in error, to show cause if any there be, why the said judgment in said writ of error mentioned should

not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller Chief Justice of the Supreme Court of the United States of America this 12th day of April 1901, and of the Independence of the United States the one hundred and twenty-fifth.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

Attest: —— ——.

Endorsed: Filed Apr. 15 1901 Geo. W. Root clerk by H. G. Simpson deputy.

Due service of the within is hereby acknowledged this 15th day of April 1901,

J. S. CHAPMAN,
Attorney for The San Jose Ranch Company (a Corporation), Defendant in Error.

171 STATE OF CALIFORNIA, } ss:
County of Los Angeles, }

I, Geo. W. Root, clerk of the supreme court of the State of California, hereby certify that the foregoing printed and typewritten pages contain a full true and correct copy of the transcript on appeal, petition for rehearing, minutes and filings of the court, opinion of the court, appellant's opening brief, respondent's brief, appellant's reply brief, respondent's closing brief, petition for allowance of writ of error, order granting writ of error, and præcipe, as the same now appear of record in my office, in the case of The San Jose Land & Water Company (a corporation) plaintiff and appellant *versus* The San Jose Ranch Company (a corporation) defendant and respondent, being L. A. No. 858 of the files of the said supreme court of the State of California, and that the same do constitute the return of the said supreme court of the State of California to the annexed writ of error issued out of the Supreme Court of the United States wherein the said San Jose Land & Water Company is plaintiff in error and the said San Jose Ranch Company is defendant in error.

I further certify that the said plaintiff in error has duly filed in my office an undertaking upon said writ of error in due form and approved by the chief justice of the said supreme court of the State of California.

In witness whereof, I have hereunto set my hand and affixed the seal of the court this 1st day of June A. D. 1901.

[Seal Supreme Court of California.]

GEO. W. ROOT,
Clerk of the Supreme Court of the State of California.
By H. G. SIMPSON, *Deputy.*

172 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the supreme court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of California, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit, between The San Jose Land & Water Company, a corporation, plaintiff and plaintiff in error, and The San Jose Ranch Company, a corporation, defendant and defendant in error, wherein was drawn in question the construction of a statute of the United States, and the decision was against the right, title, privilege or exemption specially set up or claimed under such statute, a manifest error has happened, to the great damage of the said San Jose Land & Water Company, plaintiff in error as by its said complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ so that you may have them at Washington on the eleventh day of June next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

173 Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 13th day of April, A. D. 1901.

[Seal U. S. Circuit Court, Southern Dist. Cal., 1886.]

WM. M. VAN DYKE,
Clerk of the Circuit Court of the United States for the Southern District of California,
By —— ——, *Deputy.*

Allowed:
W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

[Endorsed:] L. A. No. 858 Original Writ of error.

174 In the Supreme Court of the United States.

SAN JOSE LAND AND WATER CO., Plaintiff in Error,
vs.
SAN JOSE RANCH CO., Defendant in Error.

Stipulation.

Whereas it appears that the judgment of the supreme court of the State of California in this case was inadvertantly omitted from the transcript of the record herein, it is hereby agreed that the following certified copy of said judgment accompanying this stipulation may be filed in this court in order to supply said omission, and that the same may be printed as a part of the transcript herein,

Los Angeles, California, August 21, 1901.

J. A. ANDERSON,
Attorney for Plaintiff in Error.

Without waiving objections either to jurisdiction, sufficiency of assignment of errors, or proceedings on writ of error.

J. S. CHAPMAN,
Attorney for Defendant in Error.

175 SAN JOSE LAND AND WATER CO. *vs.* SAN JOSE RANCH CO. } L. A. No. 858. On Appeal from the Superior Court of the County of Los Angeles.

The judgment and order are affirmed.

McFARLAND, *J.*
TEMPLE, *J.*
HENSHAW, *J.*

I, Geo. W. Root, clerk of the supreme court of the State of California, do hereby certify that the preceding is a true and correct copy of an judgment filed September 13th, 1900, in the above-entitled cause, as shown by the records of my office.

Witness my hand and the seal of the court this 31st day of July, A. D. 1901.

[Seal Supreme Court of California.]

GEO. W. ROOT, *Clerk*,
By H. G. SIMPSON, *Deputy*.

176 [Endorsed:] L. A. No. 858. In the supreme court, State of California. San Jose Land and Water Co. *vs.* San Jose Ranch Co. Certified copy of judgment.

177 [Endorsed:] Supreme Court of the United States. San Jose Land and Water Co., plaintiff in error, *vs.* San Jose Ranch Co., defendant in error. Certified copy of judgment and stipulation. J. A. Anderson, attorney for plaintiff in error.

178 [Endorsed:] File No. 18,195. Supreme Court U. S. October term, 1901. Term No. 342. The San Jose Land & Water Co., pl'ff in error, *vs.* The San Jose Ranch Company. Stipulation of counsel and addition to record. Office Supreme Court U. S. Filed Aug. 27, 1901. James H. McKenney, clerk.

179 In the Supreme Court of the United States.

SAN JOSE LAND AND WATER CO., Plaintiff in Error,
vs.
SAN JOSE RANCH CO., Defendant in Error.

Stipulation.

It is hereby stipulated that a copy of the following assignments in error in the above-entitled cause has been served upon and received by John S. Chapman attorney for the defendant in error in said cause—and that the same may be filed in this court as the assignment in error in the above-entitled cause, which the plaintiff in error intended to rely on at the hearing, and that the same may be printed as a part of the transcript herein.

Los Angeles, California, August 21st, 1901.

J. A. ANDERSON,
Attorney for Plaintiff in Error.
J. S. CHAPMAN,
Attorney for Defendant in Error.

180 In the Supreme Court of the United States.

SAN JOSE LAND AND WATER CO., Plaintiff in Error,
vs.
SAN JOSE RANCH CO., Defendant in Error.

Assignment of Error.

And now comes the plaintiff in error by J. A. Anderson its attorney and says that in the record aforesaid there is manifest error and it hereby states that the errors therein which it intends to rely on at the hearing are as follows, to wit:—

I.

The supreme court of California erred in holding that the plaintiff in error as a *bona fide* purchaser under the Southern Pacific Railroad Company, acquired no title to, nor estate in the land in controversy under and by virtue of the 5th section of the act of Congress approved March 3rd, 1887, entitled "An act to provide for the readjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands and for other purposes."

II.

The supreme court of California erred in holding that actual continued possession of the land in controversy *were* essential to the main-

tenance of the right and estate to and in said land confer-ed upon plaintiff in error by the said 5th section of said act of March 3rd, 1887, as a *bona fide* purchaser from the Southern Pacific Railroad Company.

III.

That the supreme court of California erred in holding that
181 plaintiff in error was guilty of laches in not having made application to purchase said land under said 5th section of the said act of March 3rd, 1887, prior to bringing this action.

IV.

The supreme court of California erred, in holding that the act of July 6, 1886, (24 U. S. Statutes page 123) opened the land in suit, "to sale, location, or pre-emption or homestead entry," notwithstanding its withdrawal from "sale, location or pre-emption or homestead entry" in favor of the Southern Pacific Railroad Company on April 2nd, 1871, and continued till the 29th of June, 1898.

V.

The supreme court of California erred in holding that defendant in error, had the right under act of Congress to enter upon the land in controversy and build and construct thereon, "a stone, brick and cement for-bay, sand box or dam," and lay a 14-inch-pipe line across same, notwithstanding the withdrawal thereof, from the public domain in favor of the Southern Pacific Railroad Company and after the *bona fide* purchase thereof from the Southern Pacific Railroad Company, by the predecessor of plaintiff in error.

VI.

The supreme court of California erred in affirming the judgment of the superior court of Los Angeles county, notwithstanding the said superior court in its findings found.

1st. That the land in controversy was within the indemnity limits of the grant to the Atlantic and Pacific Railroad Company under grant by act of Congress of July 27th, 1866, and also within the ten-mile limit of the grant to the Southern Pacific Railroad Company by act of Congress of March, 3rd, 1871.

2nd. That the predecessors in interest of plaintiff in error made a *bona fide* purchase of said tract of land from the Southern Pacific Railroad Company on the 28th of February, 1887, sold to them by said railroad as a part of its said grant, and that defendant
182 in error adversely to the predecessor of plaintiff in error and to plaintiff in error and when forbidden by them so to do entered upon said tract of land in July and August, 1887 and built and constructed thereon, "a stone, brick and cement forebay, sand box or dam and did lay and construct from said forebay or dam across a portion of said land a 14-inch-pipe line."

3rd. That the defendant in error claims the right to maintain on

aid tract of land, the said forebay or dam and the said 14-inch-pipe ine.

Wherefore, as well for the foregoing as for other errors apparent pon the face of the record, the plaintiff in error prays that the idgment of the supreme court of the State of California, aforesaid nay be reversed, annulled and held for naught, and that it be estored to all things which it has lost by occasion of said judgnent, etc.

J. A. ANDERSON,
Attorney for Plaintiff in Error.

83 [Endorsed:] Supreme Court of the United States. San Jose Land and Water Co., plaintiff in error, *vs.* San Jose Ranch Co., defendant in error. Assignment of error and stipulation. J. A. Anderson, attorney for plaintiff in error. John S. Chapman, attorney for defendant in error.

84 [Endorsed:] File No. 18,195 Supreme Court U. S. October term, 1901. Term No. 342 The San Jose Land & Water Co., pl'ff in error, *vs.* The San Jose Ranch Company. Stipulation of counsel as to assignment of errors. Office Supreme Court U. S. Filed Aug. 27 1901 James H. McKenney, clerk.

85 In the Supreme Court of the United States.

SAN JOSE LAND AND WATER CO.
vs.
SAN JOSE RANCH CO., Defendant in Error.

Stipulation.

It is hereby stipulated between the plaintiff in error, by its attorney and the defendant in error by its attorney, that the follow- parts of the record on file herein may be printed for the consideration of the court:

I. All of the transcript on appeal from the superior court of the County of Los Angeles, State of California, to the supreme court of the State of California.

II. All that portion of the transcript on file that is in typewriting commencing with opinion of the supreme court of the State of California and closing with the certificate of *the* Geo. F. Root, clerk of the supreme court of the State of California.

III. The assignment of error on the part of the plaintiff in error and the stipulation relating thereto.

IV. The certified judgment of the supreme court of the State of California and the stipulation relating thereto. Omit title of court and cause, in full on all papers excepting the first page and insert in the place and stead thereof "Title of court and cause."

Los Angeles, California, August 21st, 1901.

J. A. ANDERSON,
Attorney for Plaintiff in Error.

Without waiving objections either to jurisdiction, sufficiency of assignment of errors or to proceeding on the writ of error.

J. S. CHAPMAN,
Attorney for Defendant in Error.

186 [Endorsed:] Supreme Court of the United States. San Jose Land and Water Co., plaintiff in error, *vs.* San Jose Ranch Co., defendant in error. Stipulation as to part of transcript to be printed. J. A. Anderson, attorney for plaintiff in error. John S. Chapman, attorney for defendant in error.

187 [Endorsed:] File No. 18,195 Supreme Court U. S. October term, 1901. Term No. 342 The San Jose Land & Water Co., pl'ff in error, *vs.* The San Jose Ranch Co. Stipulation as to parts of record to be printed. Office Supreme Court U. S. Filed Aug. 27 1901 James H. McKenney, clerk.

Endorsed on cover: File No. 18195. California supreme court. Term No. 342. The San Jose Land and Water Company, plaintiff in error, *vs.* The San Jose Ranch Company. Filed June 8th, 1901.